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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MAE-DELL LACY, Plaintiff and Respondent, v. SOLIE NOSRAT et al., Defendants and Appellants.	B172866 (Los Angeles County Super. Ct. No. LC061997)

APPEAL from the judgment of the Superior Court of Los Angeles County. Michael Harwin, Judge. Affirmed.

Law Offices of Benjamin Donel and Benjamin Donel for Defendants and Appellants.

Law Offices of Paul D. Beechen and Paul D. Beechen for Plaintiff and Respondent.

Solie and Miriam Nosrat appeal following an award of attorney fees granted to respondent Mae-Dell Lacy. The parties are adjoining landowners in Encino. Lacy alleged that the Nosrats erected a patio and fire pit and planted seven cypress trees while she was away in March 2002 and October 2000 in violation of an easement and a settlement agreement with the previous owner. Lacy sued, alleging violation of the recorded easement, and sought removal of cypress trees; removal of offending foliage and improvements as well as installation of a gate in a fence between the properties; injunction against current and potential future encroachments; compensatory and punitive damages; costs and attorney fees. Only the award of attorney fees is at issue in this appeal.

The court ruled that the Nosrats would have to remove the concrete patio within 45 days, deemed Lacy the prevailing party, and awarded her costs and attorney fees in amounts to be determined. Plaintiff initially sought $39,650 for attorney fees and inter alia costs of $1,263. In her reply, plaintiff sought additional attorney fees for responding to the opposition and $403.50 for surveyor costs. The court awarded $43,128.69 in attorney fees and costs of $1,263. Defendant Nosrats appeal.[1] Concluding there was no abuse of discretion in the trial court's determination of prevailing party and award of attorney fees, we shall affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Previous Litigation and Settlement with Nosrats' Predecessor

In 1991, Melvin Steffes sued his neighbor Mae-Dell Lacy to obtain, inter alia, a prescriptive easement over portion of the Lacy property, mostly a steep hillside area. When the matter came to trial in 1994, the parties reached a

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[1] The Notice of Appeal is from the judgment entered on November 13, 2003, which judgment declared plaintiff the prevailing party but did not include the amounts for attorney fees and costs. The Notice of Appeal adds that defendants "are appealing the decision of the superior court for naming the Plaintiff as the Prevailing Party."

settlement and executed a Settlement Agreement and Mutual Release (Settlement Agreement) on March 23, 1995. That agreement included an attorney fees agreement providing: "If suit is brought or an attorney is retained by any party to this Agreement to enforce its terms, or to collect money damages for any breach, the prevailing party shall be entitled to recover, in addition to any other remedy, reimbursement for reasonable attorneys' fees, court costs, costs of investigation, expert witness fees, and related other expenses."[2] Moreover, paragraph No. 20 of the Settlement Agreement stated it "shall be binding upon, and shall inure to the benefit of, the parties, their successors in interest and assigns." Lacy recorded an easement for her property pursuant to the Settlement Agreement in April 1995.[3]

Lacy Sues the Nosrats

The Nosrats purchased the property from Steffes in April 1996. They knew of the easement and Settlement Agreement before they made an offer on the property. When they altered their property, Lacy's attorney informed them of the encroachments and breach of the Settlement Agreement and gave them 10 days to remove the offending items. Settlement efforts failed, and Lacy filed her complaint in August 2002.

Lacy's complaint alleged causes of action for breach of contract, breach of easement agreement, injunction and trespass. The complaint further alleged that the Nosrats installed a patio on the Lacy property and outside the area upon which

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[2] The Nosrats' answer to plaintiff's complaint admitted that they are the successors of Steffes and acquired the property with knowledge of the Settlement Agreement and were bound by its provisions.

[3] According to Lacy's complaint, the easement "states a described portion of the 3418 Property [Lacy's property] may be used for the purpose of maintaining existing or similar landscaping, existing structures with the easement area and a chain link fence no more than 5 feet in height and not more than 6 inches higher than the leveled portion of the 3400 [Steffes/Nosrat] Property."

improvements were allowed under the Settlement Agreement and that Lacy was entitled to access to her property but needed a gate in the fence erected by the Nosrats on her property.

Paragraph No. 6 of the complaint, admitted in the Nosrats' answer,[4] alleged the March 1995 Settlement Agreement with Steffes resolving disputes regarding the use and occupancy of the property the Nosrats later owned and alleged: "Said agreement specifically stated it was binding upon the successors and assigns of Steffes. Defendants are the successors and/or assigns of Steffes and acquired the 3400 Property with knowledge of the Settlement Agreement and that they were bound to its provisions."

Settlement negotiations were unsuccessful. Lacy's motion for summary judgment or summary adjudication apparently failed, and the case proceeded to trial. Lacy and the Nosrats all testified as to their conflicting versions of their relationship and efforts to comply with the Settlement Agreement with respect to a patio constructed by the Nosrats and the condition of plants in the easement area, including cypress or juniper trees and the maintenance or lack thereof by the Nosrats.

Trial Court's Ruling

The matter was tried on two days in October 2003. Taking the matter under submission, the trial court found for Lacy and against the Nosrats, stating in

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[4] In their answer, the Nosrats also sought attorney fees. The Nosrats' trial brief further acknowledged that they were made aware of the 1995 agreement at the time they purchased the property from Steffes in May 1996. Compliance with that very agreement was their principal defense. They also argued Lacy waived any right to removal of the shrubs by agreeing to removal of the previous shrubs and, "as a gesture of being a good neighbor," not contesting the planting of new shrubs and that she should be estopped from asserting any right to have the patio encroachment removed when she failed to object for two months after the Nosrats informed her of their plans.

its minute order of October 14, 2003: "The patio in question is to be removed. [¶] The trees planted are to be kept to a height no greater than four feet. [¶] The gate requested by the plaintiff is denied. [¶] Defendant is ordered to properly maintain the easement area. The Court notes that the easement area is not currently being maintained properly." Lacy's request for punitive damages was denied. Moreover, the court ordered counsel for the plaintiff "to submit the judgment and a memorandum of costs and fees."

The judgment more specifically ordered the offending portion of the patio and fire pit/bird bath removed within 45 days, with provisions for plaintiff to do so if defendants did not. The court denied plaintiff's request to remove the seven cypress trees but ordered they be maintained by defendants "at a height no greater than four feet, measured from ground level at the base of said tree to the top of said tree." Moreover, the Nosrats were ordered to "maintain the foliage located in the easement area in accordance with the terms of the Settlement Agreement." Plaintiff's request to install a gate in the fence was "denied without prejudice," giving her "the right to seek approval for installation of a gate upon a showing of changed circumstances." Finally, paragraph No. 7 of the judgment stated: "Plaintiff *is hereby deemed to be the prevailing party* in this action and shall recover from Defendants . . . costs of suit in the sum of $_____ and attorney's fees in the sum of $_____." (Italics added.)

Litigation Regarding Attorney Fees

Lacy then filed her motion for attorney fees and costs, pursuant to Civil Code section 1717, requesting $39,650 for attorney fees, $1,450 for expert witness fees; $771.39 for related expenses, and statutory costs of $1,263, for a total of $43,134.39. Lacy's declaration noted she would probably incur about another $1,000 in fees and costs regarding the attorney fee motion. Her attorney set forth some of his correspondence attempting to settle the case, which the Nosrats would not do unless Lacy waived attorney fees.

The Nosrats countered with a motion for determination of prevailing party and opposition to Lacy's motion for award of attorney fees. They argued that they were the prevailing party, not that Lacy was not entitled to fees under the Settlement Agreement and Civil Code section 1717. In the alternative, the Nosrats argued the court could use its discretion pursuant to *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 and declare neither party a prevailing party.[5] Furthermore, the Nosrats' opposition contested the amount of attorney fees and various costs. Lacy's counsel included correspondence showing efforts to settle when her attorney fees and costs were only $3,425.[6]

Lacy later requested additional attorney fees and costs of $5,074.35 incurred in opposition to the Nosrats' motion to have them deemed the prevailing party and in preparing the reply memorandum, and an additional $403.50 for surveyor costs not claimed because of inadvertence.

At the hearing on January 15, 2004, the court stated: "I'm inclined to indicate that the plaintiff was the prevailing party in this case. I don't think there was ever any question in my mind." After argument by the Nosrats' new attorney, the court reiterated: "Once again, the main issue in this case was that patio. The

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[5] Mrs. Nosrat's declaration alleged abusive treatment from Lacy's attorney and the Nosrats' offer from the beginning to waive their legal rights of easement voluntarily, but Lacy and her attorney wanted "everything plus a big sum of money that Lacy had not incurred by that time." Mr. Nosrat declared they won on two of the three issues, that more than 90 percent of trial time was spent on those two issues, and that they should be able to recover their losses and get a "fair amount of attorney's fees . . . ." Both accused Lacy of lying in order to delay the case and drive up fees. A letter regarding settlement from their attorney to Lacy's counsel commented regarding the issue of attorney fees and costs that "If my clients prevail on two of the three issues, then my clients may be entitled to fees and costs."

[6] The Nosrats countered that they would have given up on all three issues, including the two they claimed they won at trial, had Lacy borne her own attorney fees.

court does find that the fees as listed were not at all out of line, and in light of the trial that I heard, the time that it took, the effort that went into it, that those are fair fees." The court awarded attorney fees of $43,128.69 and statutory costs of $1,263 to Lacy.

CONTENTIONS ON APPEAL

Appellants contend: 1. The attorney fees award assessed by the court pursuant to Civil Code section 1717 is improper because appellants were not parties to the March 1995 Settlement Agreement. 2. The attorney fees award assessed by the lower court pursuant to the March 1995 Settlement Agreement is improper because the Settlement Agreement was not recorded. 3. Respondent cannot recover attorney fees under Civil Code section 1717 because neither the mutuality theory nor the estoppel theory applies to this matter. 4. The superior court erred or abused its discretion in finding that respondent was the "prevailing party" in the action under Civil Code section 1717, given that respondent succeeded in only one of her claims and was not awarded injunction, compensatory damages, or punitive damages. 5. The superior court erred or abused its discretion in assessing the fee amount, and the fee amount was excessive given that the fee sought was based on plaintiff's attorney's activity for the entire case, and plaintiff prevailed on only one claim. 6. The superior court erred or abused its discretion in calculating the award, given that the court imposed costs in addition to an "attorney fees" award which was the amount sought by respondent including costs.

Respondent's brief sets forth the Nosrats' admission regarding their being bound by the Settlement Agreement and, given the notice of appeal from solely the determination that plaintiff was the "prevailing party," briefs primarily that issue.

DISCUSSION

1. The Nosrats did not contest the applicability of the attorney fees provision in the trial court.

Much of the appeal by the Nosrats involves whether the attorney fees provision in the Settlement Agreement applies to them, primarily because they did not know about or sign the agreement and should not be bound by the contract between Lacy and Steffes, their predecessor. They did not raise this issue in the trial court and should not be able to raise it for the first time on appeal.

Moreover, their admission in their answer and testimony at trial contradicts the contention that they were somehow unaware of the agreement before this litigation arose. The Nosrats testified they knew of the prior litigation, the agreement, and the easement – and had discussed the issue with counsel – prior to making an offer to buy the property. They also sought attorney fees based on the Settlement Agreement and should not now be heard to contest Lacy's right to seek attorney fees as prevailing party under the same agreement.

2. The determination of prevailing party.

"When a contract contains a provision granting either party the right to recover attorney fees in the event of litigation on the contract, Civil Code section 1717 (hereafter section 1717) gives the 'party prevailing on the contract' a right to recover attorney fees, whether or not that party is the party specified in the contract. It defines the phrase 'party prevailing on the contract' as 'the party who recovered a greater relief in the action on the contract,' and it provides that a trial court 'may also determine that there is no party prevailing on the contract for purposes of this section.' " (*Hsu v. Abbara*, *supra*, 9 Cal.4th 863, 865.)

"In the context of contractual fee awards under Civil Code section 1717, the rule is that in cases of 'mixed' results, where a party ' "receives only a part of the relief sought,' " the court may determine there is no prevailing party. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875 [39 Cal.Rptr.2d 824, 891 P.2d 804]; accord,

Scott Co. v. Blount, Inc. (1999) 20 Cal.4th 1103, 1109 [86 Cal.Rptr.2d 614, 979 P.2d 974]; see also *Hilltop Investment Associates v. Leon* (1994) 28 Cal.App.4th 462, 468 [33 Cal.Rptr.2d 552] [fees properly denied where result is ' "good news and bad news to each of the parties' "].) In deciding whether there is a prevailing party, the court is to 'compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.' (*Hsu*, *supra*, at p. 876.) The court has discretion to find there is no prevailing party even though Civil Code section 1717, subdivision (a) states that the prevailing party 'shall' be entitled to recover fees." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1016.)

Thus, given the mixed result in the case at bench, the trial court may well have been within its discretion in finding no prevailing party, a decision that is not disturbed on appeal absent an abuse of discretion. (*Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1397 [finding an abuse of discretion in denial]; accord *Hilltop Investment Associates v. Leon*, *supra*, 28 Cal.App.4th 462, 465-468 [no abuse of discretion in denying attorney fees where the result was "a draw"].)

The issue, however, is not whether the trial court would have abused its discretion in finding no prevailing party. The issue is whether the trial court abused its discretion in finding Lacy to be the prevailing party.

As our Supreme Court explained in *Hsu v. Abbara*, *supra*, 9 Cal.4th 863, 876, "in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the

contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' " [Citations.]

"We will not disturb the trial court's determination of the prevailing party absent a clear abuse of discretion. The trial court ' " 'is given wide discretion in determining which party has prevailed on its cause(s) of action. . . .' " [Citation.]' (*Nasser v. Superior Court* [(1984)] 156 Cal.App.3d [52,] at p. 59.)" (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158.)

Certainly, settlement prior to trial would have been preferable in the case at bench. The dispute between adjoining neighbors about a patio, trees, and a gate should have been resolved without judicial intervention. Nevertheless, the case was tried to a judge. The trial court was present to view the parties as they testified, to determine what the principal issues were, and to decide if one side or the other made litigation necessary for the other. Although the issue is a close one, we have reviewed the record and the reporter's transcript and find no abuse of discretion in the trial court's determination that Lacy was the prevailing party.

The Nosrats further contest the amount of attorney fees awarded. As courts have frequently stated, the trial court is the best judge of the reasonableness of attorney fees. "It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court, whose decision cannot be reversed in the absence of an abuse of discretion. [Citations.] . . . The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case. [Citations.] We find no reason here to disturb the trial court's

determination. [Citation.]" (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-624; accord *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 303 [rule applies whether fees are awarded either by agreement or by statute]; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [equitable considerations apply in trial court's determination of amount of fees].)

The trial court's attorney fee award of $43,128.60 in the case at bench was not an abuse of discretion. Moreover, contrary to the Nosrats' contention, the record does not reveal a double award of costs. Lacy initially sought $39,650 in attorney fees and later requested an additional $5074.35 for subsequent work by counsel; the trial court awarded less than the total requested for attorney fees and awarded $1263, the amount always requested as costs.

DISPOSITION

The judgment (order awarding attorney fees) is affirmed. Respondent is to recover costs on appeal.

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COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.